Langsam Stevens Silver & Hollaender LLP
ENVIRONMENTAL, REAL ESTATE, BUSINESS AND INSURANCE LAW

July 28, 2017

via e-mail and U.S. mail
Eric J. Wilson
Deputy Director for Enforcement and Homeland Security
Emergency and Remedial Response Division
EPA Region II, Raritan Depot
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Re: Diamond Alkali Superfund Site – Cash Out Settlements, Lower 8.3 Miles of Passaic (OU2)

Dear Mr. Wilson,

We represent Occidental Chemical Corporation ("Occidental") and Glenn Springs Holdings, Inc. with regard to the Diamond Alkali Superfund Site ("Site").

By letter dated June 1, 2017, I wrote to you in response to your May 17, 2017 letter regarding potential cash-out settlements for 20 PRPs with regard to Operable Unit 2, the Lower 8.3 miles of the Passaic River. As you requested in your May 17 letter, my June 1 letter provided to you information concerning the following cash out PRPs: Alcan Corporation (now Novelis Corporation) ("Alcan"), Mallinckrodt, Inc. ("Mallinckrodt"), and Wyeth.

Last week, on Thursday, July 20, I had the opportunity to discuss that information with Sarah Flanagan and Juan Fajardo of Region 2. Following that discussion I reviewed the proposed ASAOC which accompanied the March 30, 2017 offer letters to the 20 cash-out PRPs.

Occidental, which EPA has recognized for its cooperation with regard to the design of the remedy in OU2 of the Diamond Alkali site, is quite concerned that Region 2 has decided to utilize an administrative settlement under CERCLA 122(h)(1) as a settlement vehicle for the cash-out PRPs, rather than the required consent decree process. A consent decree would afford judicial scrutiny and transparency to these settlements and would permit affected PRPs, including Occidental, to be heard regarding their reasonableness. CERCLA 122(d)(1)(a) is quite explicit in requiring that a consent decree must be used in any agreement with any PRP "with respect to remedial action", with one exception -- de minimis settlements under 122(g). I understand from recent discussions with Region 2 that, consistent with the proposed ASAOC sent to the cash-outs on March 30, 2017, Region 2 is *not* contemplating that the cash-out settlements will be a de minimis settlement under 122(g). EPA therefore may not use an administrative settlement under Subsection 122(h) to avoid the statutory requirement to obtain a consent decree prior to effectuating these settlements.

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Section 122(d)(1)(a) states:

> "Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g), the agreement shall be entered in the appropriate United States district court as a consent decree."

As is well-known, this section was added by Congress in the SARA amendments in 1986. The primary purpose of those amendments was to ensure that remedial action settlements get the benefit of judicial scrutiny. EPA's contemplated cash out settlements are inconsistent with this statutory mandate.

Subsection 122(h) is not identified as an exception to subsection 122(d)(1)(a)'s requirement of a "consent decree", and for good reason. Subsection §122(h) ("Cost recovery settlement authority") is expressly designed "to settle a claim under section 107 for costs *incurred by the United States Government*" (emphasis added). This section, by its terms, does not permit the settlement of *either* prospective liability for remedial actions or the settlement of claims for cost recovery or contribution filed or incurred by other PRPs. Such a settlement, if it is implemented at all, must be implemented by means of a consent decree.

There is little question that the proposed ASAOC EPA intends to use also purports (wrongly) to provide a full covenant not to sue for the OU2 remedial action. See ASAOC, ¶ 32 ("… EPA covenants not to sue or take administrative action against each Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the lower 8.3 miles of the Lower Passaic River, which is OU2 of the Site."). This breadth of relief likewise cannot be provided in the absence of a judicially authorized consent decree.

Moreover, the contribution protection section of the proposed ASAOC also purports (again wrongly) to provide contribution protection for "matters addressed" in the settlement. ASAOC, ¶ 39 ("The 'matters addressed' in this Settlement Agreement are all response actions taken or to be taken, and all response costs incurred or to be incurred, at or in connection with the lower 8.3 miles of the Lower Passaic River, which is OU2 for the Site, by the United States or by any other person, except for the State;…"). This overbroad definition of "matters addressed" attempts to both: a) prevent Occidental and other PRPs from seeking a fair share contribution of their response costs from the EPA-designated cash-out parties, as is their right under CERCLA Sections 107 and 113; and, b) deprive Occidental and other PRPs from fair notice and the right to judicial review guaranteed by the consent decree mandated in Section 122(d)(1)(a). The only court of which I am aware that has examined 122(h) settlements in this context has ruled that these settlements *cannot* provide the settling party contribution protection from response costs incurred by third parties, because 122(h) authorizes settlement of only the United States costs, not third-party costs. Waste Management of Pennsylvania, Inc. v. City of York, 910 F. Supp. 1035 (MD Pa. 1995).

Accordingly Occidental intends to challenge in court the cash-out settlements, or any of them, as contrary to the language and purpose of CERCLA *unless* those settlements are implemented by means of an appropriate consent decree with full due process protections and transparency for Occidental and all other PRPs.

Please do not hesitate to contact me if you have any questions and seek additional information regarding the above.

Sincerely,
Langsam Stevens Silver & Hollaender LLP

Larry Silver

cc: Sarah Flanagan, EPA
Frances Zizila, EPA
Juan Fajardo, EPA